NO. 56579-0-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

NICOLE WILLYARD,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable John Skinder, Judge

BRIEF OF APPELLANT

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A. INTRODUCTION

Appellant Nicole Willyard[1] pleaded guilty in October of 2003 to one count of obstructing a public servant (obstruction). This plea was part of a single, indivisible agreement that included a guilty plea to unlawful possession of a controlled substance (methamphetamine) (UPCS or simple drug possession), in violation of former RCW 69.50.401(d) (2002), the statute held void and unenforceable in State v. Blake, 197 Wn.2d 170, 481 P.3d 521 (2021).

After the Blake decision, Ms. Willyard filed a motion to withdraw all the pleas she entered pursuant to the October 2003 global agreement. The trial court vacated the conviction for UPCS, but it denied Ms. Willyard's motion to withdraw the other pleas, including the plea to obstruction. The court apparently believed it would be unjust to require the State to re-prosecute the

[1] The December 2021 transcript refers to Ms. Willyard by her recent last name, Trichler. This brief uses Willyard, for consistency with the case caption and because Ms. Willyard indicated she plans to resume using that name. See RP 4.

other offenses after so many years, and it made no inquiry into whether the pleas were knowing, voluntary, or indivisibly linked.

The trial court's decision conflicts with longstanding precedent holding that an indivisible plea agreement is always indivisible: if one plea is successfully appealed, the whole agreement must be vacated. The trial court therefore abused its discretion.

This Court must remand with instructions to allow Ms. Willyard to withdraw all the pleas entered under the October 2003 agreement.

B. ASSIGNMENTS OF ERROR

1. The trial court erred by denying Ms. Willyard's motion to withdraw all three guilty pleas entered in the October 2003 indivisible agreement, including her plea to one count of obstruction.

Issues Pertaining to Assignments of Error

1. Is Ms. Willyard's collateral attack on her 2003 plea agreement time barred under chapter 10.73 RCW? (No. As the

State concedes, Ms. Willyard's motion to withdraw her pleas triggers multiple exemptions from the time bar, including the exemptions for a significant retroactive change in the law, a facially invalid judgment and sentence, and a conviction under a statute that is facially unconstitutional.)

2. Where Ms. Willyard pleaded guilty to the nonexistent crime of simple drug possession, is she entitled to withdraw that plea? (Yes.)

3. Where Ms. Willyard's guilty pleas to simple drug possession and obstruction were made at the same time, described in one document, and accepted in a single proceeding, are they parts of an indivisible agreement? (Yes.)

4. Where a defendant is entitled to withdraw a guilty plea entered as part of an indivisible agreement, and seeks to do so, is she not only entitled but *required* to withdraw every plea entered as part of that same agreement? (Yes.)

C. STATEMENT OF THE CASE

In September of 2003, the State charged Ms. Willyard with one count of unlawful possession of a controlled substance (methamphetamine) (UPCS or simple drug possession), in violation of former RCW 69.50.401(d) (2002). CP 2, 51. One month later, the State amended the charges to add one misdemeanor count of obstructing a public servant, alleging she gave a false name to an officer who asked her to identify herself on the day she was arrested for UPCS. CP 3.

The State and Ms. Willyard negotiated a global agreement whereby she would plead guilty to the UPCS and obstruction counts, under cause number 03-1-01829-9, and one count of bail jumping under a different cause number (03-1-00645-2). Sub. No. 11. In exchange for her guilty pleas, the State agreed to drop a second UPCS charge under cause number 03-1-00645-2 and recommend 14-month terms of confinement in both cases, to run concurrently. CP 15; Sub. No. 24. Ms. Willyard's single plea statement, regarding cause number 03-1-01829-9, says: "On

9/24/03 in Thurston County I possessed methamphetamine. During the crime investigation I walked away from the police officer after being told to stop." CP 18.

In February 2021, the Washington Supreme Court decided Blake, which held that Washington's strict liability drug possession statute is unconstitutional because it criminalizes innocent conduct, which is beyond the legislature's power to do. 197 Wn.2d at 195. The Blake Court declared, "the portion of the simple drug possession statute creating this crime . . . violates the due process clauses of the state and federal constitutions and is void." Id.

In July of 2021, Ms. Willyard filed a pro se Motion for Relief from Judgment, seeking to vacate her conviction for bail jumping on the ground that it was invalidated by Blake, 197 Wn.2d 170 (2021). CP 20-49. In October of 2021, the Thurston County Public Defender was appointed to represent Ms. Willyard and filed a motion on her behalf, under CrR 7.8(b)(4), seeking to withdraw

both her guilty pleas under both cause numbers covered by the October 2003 agreement. CP 50-59; Sub. No. 29; RP 12.

The Thurston County Superior Court held a hearing on those motions on December 20, 2021. RP 4.

Defense counsel explained that, under Blake, simple drug possession under former RCW 69.50.401(d) has always been a "nonexistent crime" and a "legal nullity," and that a "package [plea] deal" is therefore entirely invalid when it is predicated in part on a plea to that non-offense. RP 7-12, 13-15.

The State agreed that Ms. Willyard was "entitled to some relief," but it argued this relief was limited to an order vacating the conviction for UPCS. RP 16. The prosecutor contended Ms. Willyard's pleas were all voluntary because, "[a]t the time of her plea, the UPCS was a valid, legal charge," and that the remedy of withdrawal would be unjust because it would require the State to retry two 18-year-old cases. RP 16. As support for that argument, the prosecutor explained, "We're not talking about a homicide.

We're talking really very minor incidents here in this case." RP 16-17.

Finally, the State also contended Ms. Willyard's claims were "moot" because she had already served her entire sentence on all the counts. RP 18-19. The prosecutor explained, "I'm not sure what effective relief we are looking for here other than the charges simply go away and her record gets cleared." RP 18-19. Ms. Willyard assured the court it could afford effective relief by clearing her record: "[Y]ou know, I have consequences for this. I mean, it affects me getting a job. You know, you have no idea. It looks like it's old, but . . . it greatly affects me." RP 23-24.

On rebuttal, defense counsel argued there is no such thing as a "voluntary plea to a nonexistent crime." RP 21.

The court vacated the conviction for UPCS, but it denied Ms. Willyard's motion to withdraw the pleas to bail jumping and obstruction, finding she had not "satisfied that test for when withdrawal of plea is appropriate." RP 21-23; CP 60-68. The court did not explain what test that was. RP 21-23. It appeared to

conclude it would be unfair to make the State retry the bail jumping and obstruction cases after so much time had passed. RP 13.

Ms. Willyard timely appealed. CP 71-72.

D. ARGUMENT

THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING MS. WILLYARD'S MOTION TO WITHDRAW HER OCTOBER 2003 GUILTY PLEA TO OBSTRUCTION

Blake's holding is retroactive, meaning that a conviction under Washington's simple drug possession statute "is and has always been a legal nullity." State v. Paniagua, __ Wn. App. 2d __, 511 P.3d 113, 116 (2022) (citing PRP of Ali, 196 Wn.2d 220, 236, 474 P.3d 507 (2020); Evans v. Brotherhood of Friends, 41 Wn.2d 133, 143, 247 P.2d 787 (1952)). Accordingly, this Court has repeatedly recognized that a conviction for simple drug possession, entered at any time under the statute invalidated in Blake, is a conviction for a "'nonexistent crime.'" State v. A.L.R.H., 20 Wn. App. 2d 384, 386, 500 P.3d 188 (2021) (quoting Hinton, 152 Wn.2d at 857); State v. Lindberg, noted at 19 Wn. App. 1037, 2021 WL 4860740, at *2 (citing Hinton, 152 Wn.2d at

857); State v. Landry, noted at 18 Wn. App. 2d 1037, 2021 WL 3163092, at *2 (citing Hinton, 152 Wn.2d at 857); State v. Spadoni, noted at 17 Wn. App. 2d 1046, 2021 WL 1886205, at *1 (citing Hinton, 152 Wn.2d at 857-58).[2]

As explained below, longstanding precedent holds that a petitioner establishes "actual and substantial prejudice," warranting relief on collateral review, where she has pleaded guilty to a "nonexistent crime." PRP of Hinton, 152 Wn.2d 853, 857, 100 P.3d 801 (2004). Such a petitioner is entitled to withdraw the plea. In re Thompson, 141 Wn.2d 712, 720-23, 10 P.3d 380 (2000); In re Knight, 4 Wn. App. 2d 248, 253, 421 P.3d 514 (2018) (quoting Hinton, 152 Wn.2d at 860).

Under this precedent, Ms. Willyard is entitled to withdraw her guilty plea to UPCS—a crime that did not exist at the time she entered her pleas. And because that guilty plea was part of an

[2] Ms. Willyard cites these unpublished decisions for whatever persuasive authority this Court deems appropriate, pursuant to GR 14.1.

indivisible agreement under which she also pleaded guilty to obstruction, Ms. Willyard is entitled (indeed, she is required) to withdraw her plea to the obstruction count, as well.

The trial court's contrary conclusion, which appears to have been based on the view that it would be too inconvenient for the State to re-prosecute the obstruction case 18 years after the initial charges, applies the wrong legal standard and thus constitutes an abuse of discretion.

Standard of Review

"A motion to withdraw a plea after judgment has been entered is a collateral attack," governed by chapter 10.73 RCW. State v. Buckman, 190 Wn.2d 51, 60, 409 P.3d 193 (2018); CrR 7.8(b). Accordingly, a petitioner seeking relief under CrR 7.8(b) for a constitutional error must demonstrate that the error caused "actual and substantial prejudice." PRP of Swagerty, 186 Wn.2d 801, 807, 838 P.3d 454 (2016).

Whether to grant a motion under CrR 7.8 is within the trial court's discretion. State v. Hardesty, 129 Wn.2d 303, 316-17, 915

P.2d 1080 (1996). A trial court abuses its discretion if its action is "manifestly unreasonable or based on untenable grounds." State v. Salgado-Mendoza, 189 Wn.2d 420, 427, 403 P.3d 45 (2017). A discretionary decision is manifestly unreasonable and based on untenable grounds if, in reaching that decision, the trial court applied the wrong legal standard. Id.

1. As a preliminary matter, the State has properly conceded that Ms. Willyard's motion to withdraw her pleas is not time barred.

In its response to Ms. Willyard's motions to withdraw her pleas, the State conceded that the motion was not time barred under chapter 10.73 RCW. Sub. No. 35, at 3. That concession was proper for several reasons.

As a general rule, a motion under CrR 7.8(b) may not be filed more than one year after the judgment becomes final, "if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction." RCW 10.73.090(1). There are, however, exceptions to this time bar. RCW 10.73.100(1)-(6).

Under RCW10.73.100(2), the one-year time limit "does not apply" when "the statute that the defendant was convicted of violating was unconstitutional on its face or as applied to the defendant's conduct[.]"

Likewise, the one-year time limit "does not apply" when "there has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal or civil proceeding […] and either the legislature has expressly provided that the change in the law is to be applied retroactively, or a court, in interpreting a change in the law that lacks express legislative intent regarding retroactive application, determines that sufficient reasons exist to require retroactive application of the changed legal standard." RCW 10.73.100(6).

Finally, the time bar does not apply where a judgment or sentence is invalid on its face. PRP of Coats, 173 Wn.2d 123, 134-36, 138-39, 267 P.3d 324 (2011); RCW 10.73.090(1). A judgment or sentence is invalid on its face where, together with related

documents such as the charging information or plea statement, it shows that the trial court exceeded its authority by sentencing the defendant for a nonexistent crime. Id.; PRP of Hinton, 152 Wn.2d 853, 857, 100 P.3d 801 (2004).

Ms. Willyard's motion to withdraw her obstruction plea satisfies all these exemptions from the time bar in chapter 10.73 RCW. She does not expect the State will contend otherwise in this appeal but, if it does, this Court must reject the contention.

2. Ms. Willyard is entitled to withdraw her guilty plea to simple drug possession under former RCW 69.50.401(d) (2002) because it is a guilty plea to a nonexistent crime.

Under longstanding precedent, a defendant who pleads guilty to a nonexistent crime "establishes actual and substantial prejudice resulting from constitutional error." E.g., Hinton, 152 Wn.2d at 858-61. Such a defendant is therefore entitled to withdraw the plea, even on collateral attack. In re Thompson, 141 Wn.2d at 720-23; In re Knight, 4 Wn. App. 2d at 253 (quoting Hinton, 152 Wn.2d at 860); State v. De Rosia, 124 Wn. App. 138,

149, 100 P.3d 331 (2004) (quoting State v. McDermond, 112 Wn. App. 239, 243, 47 P.3d 600 (2002), overruled on other grounds by State v. Mendoza, 157 Wn.2d 582, 590-91, 141 P.3d 49 (2006)) ("'If the plea was not valid when entered, the trial court must set it aside regardless of "manifest injustice."'").

In re Thompson, 141 Wn.2d 712, illustrates this rule. In that case, the defendant pleaded guilty to one count of first-degree rape of a child, in exchange for the State's agreement to dismiss two other counts. 141 Wn.2d at 716. The plea agreement stated the offense occurred between 1985 and 1986, but the statute creating the offense to which the defendant pleaded guilty was not enacted until 1988. Id. Four years later, the defendant filed a personal restraint petition arguing the agreement violated ex post facto and due process clause protections. Id. at 719.

Our Supreme Court granted the petition and vacated the defendant's plea, holding that the proper remedy was to "return the parties to the status quo ante, . . . the position they were in before they entered into the agreement." Id. at 715-16, 730. The Court

explained that, while a defendant may waive constitutional protections in a plea agreement, the waiver must be clear from the record. Id. at 719-20. Absent clear evidence that the defendant had deliberately bargained away the protections, "the incarceration of Petitioner for an offense which was not criminal at the time he committed it is unlawful and a miscarriage of justice." Id. at 719, 720-25.

Like the petitioner in Thompson, Ms. Willyard pleaded guilty to an offense the State had no authority to charge her with—in Ms. Willyard's case, the nonexistent crime of simple drug possession under former RCW 69.50.401(d) (2002). Compare id. and CP 51-52. Even if Ms. Willyard could waive her fundamental due process right not to be punished for innocent conduct,[3] her plea agreement did not do so. CP 13-19. Like the petitioner in Thompson, Ms. Willyard is therefore entitled to withdraw her plea to the nonexistent crime.

[3] See Blake, 197 Wn.2d at 195.

3. Because the guilty plea to UPCS was part of the same indivisible agreement that included the guilty plea to obstruction, Ms. Willyard is entitled (indeed, required) to withdraw both pleas.

"Plea agreements covering multiple counts are indivisible." State v. King, 162 Wn. App. 234, 241, 253 P.3d 120 (2011) (citing State v. Bisson, 156 Wn.2d 507, 518–520, 130 P.3d 820 (2006); State v. Turley, 149 Wn.2d 149, 400, 69 P.3d 338 (2003)). "Thus, if there is error on one count of a multicount agreement, the entire plea agreement must be set aside upon request." Id. (citing Turley, 149 Wn.2d at 400-401).

To determine whether a plea was part of an indivisible "package deal," the reviewing court "looks to objective manifestations of intent." PRP of Bradley, 165 Wn.2d 934, 941, 205 P.3d 123 (2009), abrogated on other grounds by PRP of Stockwell, 179 Wn.2d 588, 600, 602-03, 316 P.3d 1007 (2014) and State v. Barber, 170 Wn.2d 854, 856, 248 P.3d 494 (2011). "Where 'pleas to multiple counts or charges were made at the same time, described in one document, and accepted in a single

proceeding,' the please are indivisible." Id. at 941-42 (quoting Turley, 149 Wn.2d at 400).

Ms. Willyard's pleas to UPCS and obstruction are clearly indivisible under this standard, and the State has never contended otherwise. See RP 16 (prosecutor arguing only that court need not reach the question of indivisibility, because Ms. Willyard had not demonstrated the requisite "manifest injustice" warranting withdrawal of the pleas). They were made at the same time, described in one document, and accepted in a single proceeding. CP 4-19.

Under Turley and its progeny, this package plea deal stands or falls as a package. It is indivisible. In fact, even if Ms. Willyard sought to withdraw or vacate *only* her plea to UPCS, the court would be required to deny her request. Swagerty, 186 Wn.2d at 812 ("specifically reject[ing]" defendant's requested remedy of resentencing on single count entered pursuant to a global agreement, as incompatible with Turley and basic principles of fairness). This Court is likewise required to grant her request to

withdraw the plea to obstruction, which is indivisibly linked to the unlawful UPCS plea.

E. CONCLUSION

Ms. Willyard pleaded guilty to obstruction as part of an indivisible agreement that included her guilty plea to the nonexistent crime of simple drug possession. Because she is entitled to withdraw the plea to the nonexistent offense, she is also entitled (in fact, required) to withdraw the indivisibly linked obstruction plea, as well. The trial court abused its discretion by denying her motion to withdraw both pleas.

Consistent with decades of controlling precedent, this Court must remand with instructions to allow Ms. Willyard to withdraw the entire indivisible agreement, including her plea to obstruction.

I certify that this document was prepared using word processing software and contains 2,990 words excluding the parts exempted by RAP 18.17.

DATED this 4th day of August, 2022.

Respectfully submitted,

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